

House Business and Labor Committee  
February 17, 2011

HB 505 – Presumptive Diseases for Fire Fighters  
Summary of Testimony  
Michael W. Sehestedt  
MACo Chief Counsel

While the Fiscal Note for this bill was not available to the Public as of 5 PM yesterday, the Fiscal Note for a very similar bill (HB 408) introduced in the 2009 Legislative Session indicated that the cost of presumptive disease coverage for firefighters could not be determined. The same fiscal note went on to note that an analysis of HB 408 by the National Council on Compensation Insurance estimated that HB 408 would increase the cost of workers' compensation for firefighters by 15% to 70%.

While the increase for firefighters alone was not estimated to increase the total cost workers compensation for all workers significantly, as discussed below, it is doubtful as matter of law that this benefit, the presumption that one of a list of diseases is the result of employment, can be made a part of workers' compensation without extending a like presumption to all workers covered by workers' compensation.

Currently all workers are covered for occupational diseases. The requirement however is that the employee who claims an occupational disease is required to show that his or her disease is in fact related to their employment.

This bill will reverse that standard but only for the small and limited group of persons employed as fire fighters. For firefighters it will, if this bill becomes law, be presumed that heart disease, lung disease, and the long list of cancers and other diseases set out in Section 1 of the bill at page 4, lines 24-29 are caused by employment and occupational disease benefits will be made available without proof of causation.

If it were possible to be certain that the benefits offered to firefighters by this bill could be limited to this special group the potential cost to the Workers' Compensation system, uncertain but large though these costs will certainly be,

might be a risk worth taking. However it is not certain that the benefits offered to firefighters under this bill can be limited to firefighters.

In Stavenjord v. MT State Fund, 2003 MT 67 the Montana Supreme Court, in a decision on the different benefits provided to workers claiming an occupational disease as opposed to workers claiming an injury, held that equal protection required equal compensation for workers with equal impairments.

The essence of equal protection is that similarly situated persons should be treated equally by the law. Under current law all workers claiming an occupational disease are treated equally. If the worker can show that their disease is caused by their employment they are entitled to compensation. If this bill passes, all workers will not be treated equally since many illnesses will be presumed to be work related for firefighters, while all other workers will still be required to prove that their illness is work related.

This unique status for fire fighters can be sustained against an equal protection challenge made a non-fire fighter only if the statistically increased chance of occupational disease is unique to fire fighters. Quite simply and sadly it is not. Many occupational groups experience statistically increased chances of certain cancers and other diseases which this bill presumes are unique in their increased statistical frequency to fire fighters. The following is but a small sample drawn from the Web of such occupational increased statistical chances.

Epidemiological studies show increased lung and bladder cancer in aluminum workers.<sup>1</sup>

Studies show strong associations of cancers of the nasal cavities and paranasal sinuses in workers exposed to wood dust<sup>2</sup>

Farmers have a higher incidence of several cancers including leukemia, non-Hodgkin's lymphoma, and brain cancer, prostate and skin cancer<sup>3</sup>

Hairdressers experience increased risks for cancer<sup>4</sup>

---

<sup>1</sup> National Institute of Occupational Safety & Health

<sup>2</sup> National Institute of Occupational Safety & Health

<sup>3</sup> Cancer Research, 50(20) 6585-6591, 1990 & Occupational Medicine, State of the Art Reviews, Hanley & Belfus, Inc: Philadelphia, PA 1997

<sup>4</sup> International Journal of Cancer,, 105(1):108-112, 2003

Diesel truck drivers are approximately 50% more likely to get lung cancer than other workers<sup>5</sup>

Without further belaboring the point many other examples exist of occupations where studies show that the occupation has an increased statistical risk of cancer including farm workers, dry-cleaning workers, painters, and industrial spray painters.

Similarly Cardio Vascular Disease is wide spread in the population as whole. A male free of CVD at age 50 has a life time risk of 51.7% of developing CVD and woman free of CVD at age 50 has a life time risk of 39.2% of developing CVD (Medscape Today) Similarly the risk of cancer is wide spread with the American Cancer Society reporting the following risks: For males free of cancer at age 40 there is a 1 in 12 risk of cancer before age 59 and for females free of cancer at age 40 there is 1 in 11 risk of cancer before age 59. If many of these diseases are presumed to be a result of employment for firefighters, then, since a negative (the disease was not a result of employment) is impossible to prove the workers' compensation system will be providing special benefits to this select group which are not generally available to other workers at a cost which cannot even be accurately estimated.

What these examples demonstrate is that the statistically increased risk of occupational disease is not unique to firefighting as a profession and that some of the listed diseases are widespread in the population generally. This calls into question the basis for treating firefighters differently than other workers in the coverage for occupational diseases provided under Workers' Compensation.

If an equal protection challenge is made and succeeds to the creation of special class for fighters, then the result will be extension of the presumptive disease standard to any and all occupations where there exist statistical indications of increased risk of occupational disease. This cost will not be insignificant, it will be catastrophic.

If it is decided that firefighters are entitled to the special benefit of a presumption that certain diseases are a result of their service as firefighters, then those provisions should be incorporated in Montana Fire Fighters Unified

---

<sup>5</sup> Occupational Environmental Medicine, 60(7): 516-520, 2003 & American Journal of Industrial Medicine, 36(4): 405-414, 1999

Retirement Act and not by the creation of a special class under workers' compensation. The actuarial incidence of these diseases among firefighters can be determined and the cost of providing this benefit allocated as cost of employing firefighters and providing for firefighters disability and retirement.

Many, if not most states, that provide for presumptive diseases for firefighters provide these special benefits as a part of their firefighters retirement systems. Such a solution is particularly appropriate in Montana where our jurisprudence indicates that the provision of different benefits for different but similarly situated groups under the Workers' Compensation Act is susceptible to challenge on equal protection grounds.

This Committee should recommend do not pass on HB 505 on the grounds that the costs are unknown but substantial and on the grounds that it creates without a rational basis a special class for purposes of determining entitlement to occupational disease benefits with the possibility that these benefits will be extended to all employees on the grounds that to deny them to all employees would violate equal protection.